IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 23

CALVIN TURNER, et al.,
Appellants,

v.

W. W. FOUCHE, et al.,
Appellees.

Appeal from the United States District Court for the Southern District of Georgia.

MOTION OF APPELLEES (OTHER THAN STATE OF GEORGIA) TO DISMISS OR AFFIRM AND ARGUMENT IN SUPPORT THEREOF.

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OPINION BELOW.

The opinion of the court below is now reported 290 F. Supp. 648.

INTRODUCTORY STATEMENT.

The jurisdictional statement of appellants was received by counsel for appellees other than State of Georgia December 15, 1968. On January 8, 1969, John W. Davis, Esq., Clerk of this Court, extended the time for filing of motions by us to January 31, 1969.

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, said appellees move:

(a) That the appeal be dismissed, or, in the alternative

(b) That the judgment of the District Court be affirmed.

With respect to the motion to dismiss, said appellees show that the jurisdictional statement recites:

> "Jurisdiction of this Court is invoked pursuant to 28 U. S. C., § 1253, to review the judgment of the district court. That court was properly convened pursuant to 28 U. S. C., § 2281, because the action seeks to restrain enforcement of state statutes and constitutional provisions on the ground that they violate the Federal Constitution. See e. g. Idlewild Bon Voyage Liquor Corporation v. Epstein, 370 U. S. 713 (1962)."

Movants aver that the three-judge court was not properly convened pursuant to 28 U. S. C., § 2281, for that the averments of the complaint did not constitute a case cognizable by a Three-Judge Court.

With reference to the motion to affirm, said appellees aver that even if their motion to dismiss be denied, the questions presented are so unsubstantial as not to warrant further argument.

ARGUMENT ON MOTION TO DISMISS.

As stated by the District Court:

> "Defendants named in the complaint are the members of the Board of Education of Taliaferro County and the jury commissioners of Taliaferro County. Additionally, three citizens of Taliaferro County were sued individually and in their capacity as grand jurors of Taliaferro County but they were dismissed by an order entered on January 30, 1968, granting a motion to dismiss for failure to state a claim against them upon which relief could be granted." 290 F. Supp. at p. 650.

There was a motion filed to dissolve the Three-Judge Court. It was denied. Its grounds were:

(a) No substantial question of the constitutionality *vel non* of any state statute appears from the face of the pleadings, the mere allegation that certain statutes are unconstitutional under certain clauses of certain amendments to the Constitution being insufficient;

(b) No substantial question of the Georgia statutes quoted in the complaint is raised in that the complainant does not seek to forestall the demands of any general state policy, the validity of which he challenges;

(c) A Three-Judge Court is not required or authorized in a case where the complaint is that the statutes are unconstitutional as applied.

It is clear that the complaint did not seek to forestall the demands of any general state policy, the validity of which was challenged.

The only case cited by the appellants in their jurisdictional statement to sustain the jurisdiction of a Three-Judge Court is **Idlewild Bon Voyage Liquor Corp. v. Ep-**

stein, et al., 370 U. S. 713. There the suit was filed in a Federal District Court after the appellant there had "been informed by officials of the State of New York that its business . . . was illegal under a state statute . . ." Petitioner sought to have that statute, as applied, declared repugnant to certain provisions of the Federal Constitution. The Court of Appeals of the Second Circuit thought that a Three-Judge Court should have been convened but that it was powerless to direct such action. The Supreme Court held that a Three-Judge Court should have been convened, and remanded the case for expeditious action in accordance with that view.

There, as expressed by the Court of Appeals, the complaint challenged "the constitutionality under the Federal Constitution of a state statute and" challenged "it because of the way that statute was being applied by the regulatory commission created by it. Stratton v. St. Louis, S. W. Ry. . . . 282 U. S. 10 . . . in clear and unequivocal terms declared that the three-judge district court was meant to be the tribunal to deal with constitutional challenges to state activity." **Idlewild v. Rohan** (289 F. 2d at 428).

In **Stratton**, supra, the action was brought by a railway company against the Secretary of State of Illinois to restrain the enforcement of minimum franchise tax statute of the State of Illinois.

Here, the defendants were members of the Board of Education of Taliaferro County and the jury commissioners of that county, all local officials, and three citizens of that county who were sued individually and in their capacity as grand jurors of Taliaferro County.

In that situation, the rule of **Ex parte Collins**, 277 U. S. 565, should have been applied, and the Three-Judge Court dissolved.

Ex parte Collins, supra, is followed and applied in **Pierre v. Jordan**, 333 F. 2d 951, 956, wherein the Ninth Circuit Court of Appeals held:

> "Section 2281 requiring three judge district courts in certain cases, does not apply where, although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to a particular municipality or district" (Certiorari denied, 379 U. S. 974; Petition for rehearing denied, 380 U. S. 927).

See also:

Phillips v. United States, 312 U. S. 246;
Ex parte Bransford, 310 U. S. 354.

Ex Parte Collins, supra, has recently been cited, applied, and followed in **Moody v. Flowers**, 387 U. S. 97, wherein at page 101-2, Mr. Justice Douglas writing for the Court wrote:

> "The Court has consistently construed the section as authorizing a three-judge court not merely because a state statute is involved but only when a state statute of general and statewide application is sought to be enjoined. See, e. g. Ex parte Collins, 277 U. S. 565 . . . The term 'statute' in § 2281 does not encompass local ordinances or resolutions. The officer sought to be enjoined must be a State officer; a three-judge court need not be convened where the action seeks to enjoin a local officer (Ex parte Collins, supra; Rorick v. Board of Commissioners, supra) unless he is functioning pursuant to a state policy and performing a state function. Spielman Motor Sales Co. v. Dodge, 295 U. S. 89 . . . Nor does the section come into operation where an action is brought against state officers performing matters of

purely local concern. Rorick v. Board of Commissioners, supra'' (307 U. S. 208).

As we shall presently show the situation is not like that considered in **Sailors v. Board of Education of County of Kent,** 387 U. S. 105, decided the same day in **Moody v. Flowers,** supra, and distinguishing it (p. 107).

> ''To raise a substantial constitutional question, the complainant must 'seek to forestall the demands of **some general state policy,** the validity of which he challenges.' Phillips v. United States, 312 U. S. 246 . . .;'' **Clemmons v. Congress of Racial Equality,** 201 F. Supp. 737, 745-6.

Here—there is no general state policy involved or challenged.

No state officer is named as a party defendant.

The gist of the alleged cause of action (complaint, Par. 18) is that plaintiffs . . . ''are unable to enjoy the full and equal benefit of public education in Taliaferro County, Georgia.''

That county is one of 159 in Georgia. It ranks 154th in population among the 159. It has a population (1960 census) of 3370. The population of Georgia by the same census was 3,943,116. So, involved are 1/1300 of the people of Georgia. It has an area of 195 square miles of Georgia.

That the alleged situation is peculiar to Taliaferro County is graphically shown by the averments of Paragraph 11 of the complaint:

> "Defendants have chosen and threaten to continue to choose an all-white school board to superintend the all-black public schools of Taliaferro

> County, Georgia, pursuant to a number of State Constitutional statutes (sic) or provisions."

Paragraphs 9, 10, 11 (a), 11 (c), 11 (d), 12, 13, 14, 15, 16, 17, 18, indeed, every paragraph save one (Par. 8) of the "Cause of Action" sought to be alleged in the complaint (III, pages 3-10) pertain only to Taliaferro County.

At page 3 of the "Jurisdictional Statement" are the "Questions Presented." The second is:

> "Whether the Georgia system of selection of school board members violates the Thirteenth, Fourteenth and Fifteenth Amendments where Negroes constitute over sixty per cent of the population, fifty per cent of the electorate, and all of those attending public schools, but only a disproportionate minority of those who appoint board members?" (Emphasis added.)

That the alleged situation applies only to Taliaferro County is shown by the "Introduction" to the "Statement" in the same document (page 3).

Also, therefore, it is clear that the plaintiffs are attacking only the application of those amendments (and statutes) to the facts as they are alleged to exist in one of Georgia's 159 counties.

> "The plaintiff has made sweeping statements as to the constitutionality of Art. 542 l. c. In substance, however, he attacks only the application of the statute to the facts in question. In these circumstances, a three-judge Federal court need not be convened. Phillips v. United States, 1941, 312 U. S. 246, 61 S. Ct. 480, 85 L. Ed. 800." **McGuire v. Sadler**, 337 F. 2d 902, 906 (U. S. C. A., Fifth Circuit—Circuit Judges Tuttle, Rives and Wisdom).

That the questions presented are unsubstantial will be more fully argued in connection with the motion to affirm.

That factor is one to be considered also in connection with the convening of a Three-Judge Court.

> "To warrant direct appeal to Supreme Court under Judicial Code, § 266, as amended by Act Feb. 13, 1925, § 1 (Comp. St. Supp. 1925, § 1243), question of constitutionality of statute must be substantial." **In re Buder, et al.**, 46 S. Ct. 557 (4), 271 U. S. 461 (Judicial Code, § 266, was a predecessor of the present Title 28, U. S. C.).

Buder, as well as **L&N R. Co. v. Garrett**, 231 U. S. 298, are cited approvingly in **Ex Parte Paresky**, 290 U. S. 30.

In **People of the State of Illinois ex rel. Sankstone v. Jarecki**, 346 U. S. 861, 74 S. Ct. 107, the Supreme Court granted motions to dismiss and dismissed an appeal for the want of a substantial federal question. The facts and opinion appear, 116 F. Supp. 422. Cited there in support of the ruling were: **Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.**, 292 U. S. 386, 54 S. Ct. 732, and **California Water Service Co. v. City of Reading**, 304 U. S. 252.

The Oklahoma case (292 U. S. at page 390) categorically holds: "The procedure prescribed by Section 266 may be invoked only if the suit is one to restrain the action of state officers." At page 391, the court said the three-judge procedure "designed for a specific class of cases, sharply defined, should not be lightly extended."

The California case holds that a substantial federal question must be presented.

> "The jurisdiction of the three-judge court, or of the Supreme Court on appeal, may be raised at any point in the proceeding. It may be raised for the first time when the case reaches the Supreme Court. United

States v. Griffin, 303 U. S. 226. Or it can be raised by the Court on its own motion. Stratton v. St. Louis Southwestern R. Co., 282 U. S. 10."

Supreme Court Practice (Robert L. Stern; Eugene Gressman), Third Edition, pp. 51-2.

We raised the question at the outset by a motion to dissolve the Three-Judge Court. The court below denied our motion, but in its opinion (290 F. Supp. at page 652) said:

"The court finds and concludes that the constitutional provision and the statutes in question are not unconstitutional on their face or as applied. There is nothing in the constitutional provision or in the statutes which contemplates or permits the resulting systematic exclusion from the grand juries. The standards are not inadequate. The facts showed systematic exclusion in the administration of the grand jury system prior to the revision but this resulted from the administration of the system and not from the constitutional provision and statutes under attack. The court also concludes that the provision requiring that members of the school board be freeholders has not been shown to be an unconstitutional requirement. There was no evidence to indicate that such a qualification resulted in an invidious discrimination against any particular segment of the community, based on race or otherwise. There is thus no merit in the three-judge District Court questions presented."

We invoke that quotation as a prelude to our

ARGUMENT ON MOTION TO AFFIRM.

The quotation above shows that the questions presented are so unsubstantial as not to warrant further argument.

We have hereinbefore discussed the second of the "questions presented" as stated by the appellants in their jurisdictional statement. The other two questions presented were stated at page 3 of that statement as follows:

> "1. Whether Georgia's restriction of service on juries to the 'upright and intelligent' and on jury commissions to the 'discreet' violates the Fourteenth Amendment where both provisions provide an 'opportunity to discriminate' racially which has been 'resorted to'?"
>
> "3. Whether Georgia's restriction of service on juries to freeholders violates the Fourteenth Amendment?"

As we first read question 3 we were convinced that counsel for the appellants had mis-stated the question. There is no such restriction of service on juries in Georgia.

What counsel for appellant intended to say is shown at page 24 of the statement: "The state's restriction of membership on County Boards of Education to freeholders violates the equal protection clause of the Fourteenth Amendment."

By letter of December 16, 1968, counsel corrected the erroneous question on page 3.

At page 11, counsel for appellants argue:

> "Ga. Code Ann. Title 59, §§ 101, 106 are unconstitutionally vague and discriminate against Negroes by permitting their arbitrary exclusion from service as Jury Commissioners and jurors in violation of the Fourteenth Amendment to the Constitution of the United States."

§ 59-101, Ga. Code Ann. provides for the appointment of a board of jury commissioners by the judge of the superior court. The superior court in Georgia is the highest trial court. Judges thereof are elected by the people though the governor may appoint to fill vacancies in judgeships.

The boards of jury commissioners in each county are composed of six persons. They must **not** be practicing attorneys at law or county officers. They must be discreet.

The constitutional attack on this section derives from the use of the adjective "discreet." It is argued that this adjective creates uncertainty, indefiniteness, vagueness.

Under the Constitution of Georgia (Art. VI, § XIII, par. 1—Ga. Code Ann., § 2-4801) no person may be a superior court judge unless he (or she) shall have attained the age of 30 years, shall have been a citizen of the state three years, and have practiced law for seven years. Certainly a person possessing those qualifications will be presumed to know that "discreet" means "prudent; cautious; wary; careful about what one says or does" or, if he doesn't know to look up its meaning.

Discreetly means with discernment, prudently, judiciously.

Parks v. DesMoines, 191 N. W. 728.

Ga. Code Ann. Title 58, § 106, as set out at pages 44-45 of the Jurisdictional Statement is evidently derived from an act of the General Assembly (approved March 30, 1967) appearing in Vol. I, Georgia Laws 1967, p. 251.

Ga. Code Ann. Title 59, § 106 as it appears in the 1968 Cumulative Pocket Part thereof seems to be derived from an act of the General Assembly of 1968 (p. 533).

An editorial note appended thereto is "Acts 1968, p. 533, entirely superseded the former section."

Both acts contain the phrase to which appellants object, to wit: "upright and intelligent citizens."

The standard of "uprightness and intelligence" can certainly not be adjudged uncertain, indefinite or vague.

For a century at least that standard has appeared in the Georgia law. Georgia's constitution of 1868 (the year of the adoption of the Fourteenth Amendment) declared "that the General Assembly shall provide by law for the selection of upright and intelligent persons to serve as jurors" **(Moses v. State**, 60 Ga. 140, 141). The act of 1869 (Ga. Laws 1869, p. 139) provided in what manner those upright and intelligent persons shall be selected as jurors.

A "statute is constitutional on its face if it be sufficiently clear to furnish guide to anyone who proposes to act in light of its provisions."

Turner v. Goolsby, 255 F. Supp. 724, 725 (1).

See also

McGowan, et al. v. Maryland, 366 U. S. 420, 421 (2), 428-9;
United States v. Harriss, 347 U. S. 612, 617-8;
United States v. Petrillo, 332 U. S. 1.

Section 59-106 as it appeared in the Code of 1933 used the phrase "upright and intelligent" as did the codes back to 1869, to wit: 1910, P. C., § 819; 1895, P. C., § 818; 1882, § 3910 (d); 1873, § 3907.

There seems to be no Georgia case in that whole century defining the phrase. We suppose that is so because the meaning of the words is so plain that in 100 years no one has questioned their meaning.

We find no adjudicated meaning of the phrase in "Words and Phrases" though "integrity" has been defined as synonymous with probity, honesty and **uprightness** in business relations with others.

In re Bauquier's Estate, 26 Pac. 178;
In re Gordon's Estate, 75 Pac. 672.

> "In the absence of any constitutional provision on the subject, and so long as the essential requirements of trial by jury are preserved, the qualifications of jurors are matters of legislative control and in the exercise of its control, the legislature may restrict, abridge, deny or enlarge the right and duty of jury service." Juries, 50 C. J. S., § 134, citing among others: **Hoxie v. U. S.**, 15 F. 2d 762; **Tynan v. U. S.**, 297 Fed. 177, in each of which certiorari was denied, and **U. S. v. Roemig**, 52 F. Supp. 857.

As corrected, the third question presented is: Whether Georgia's restriction of membership on County Boards of Education to "freeholders" violates the Equal Protection Clause of the Fourteenth Amendment.

(Appellant, Calvin Turner, testified that he was a real property owner, so that question hardly affects him.)

Title 32, § 902 (Appendix to Jurisdictional Statement, p. 41), Ga. Code Ann. requires that county boards of education be composed of "five freeholders." So does Article 8, Section 5, Par. 1 of the Georgia Constitution. (Ibid, p. 40).

The complete answer to this phase of the case would seem to be **Vought, impleaded with Collins v. State of Wisconsin**, 217 U. S. 590.

The plaintiff in error was convicted and sentenced. He asserted that the law under which the jury was drawn

violated the Fourteenth Amendment in that "it is a denial of equal protection of the law and of due process of law to be put on trial under an indictment found by persons selected by jury commissioners who are required by statute to be freeholders."

The court disposed of the contention in two sentences: "Writ of error dismissed for want of jurisdiction. The Federal question attempted to be raised is without merit."

Thus a state may constitutionally require a jury commissioner to be a freeholder. *A fortiori*, a State may require a member of a County Board of Education to be a freeholder. The reasons are succinctly discussed by the Supreme Court of Georgia in **Thornton v. McElroy**, 193 Ga. 859. There, an act of the General Assembly creating the Board of Commissioners of Roads and Revenues of Clayton County provided that the commissioners should be freeholders and qualified voters of said county. McElroy was not a freeholder of Clayton County though he did own land in another county. He was held to be disqualified. The court said:

> "This is also the reasonable construction to be given the sentence, because a person's ownership of land in one county would seem to have little or no relationship to his qualification to hold office as a county commissioner in another county, while his ownership of land in the county in which he is elected commissioner might be expected to have a direct bearing on his conduct in the performance of the duties of that office. The board of commissioners has charge of the fiscal affairs of the county, and the amount of taxes levied may depend to a large extent upon the manner in which the affairs of the county are conducted by that board. A commissioner who owns real estate in the county, which must bear its proportionate part of the cost of government, might

reasonably be expected to be more prudent in the expenditure of county money than one who does not own property in the county."

Appellants do not in the appendix to their jurisdictional statement include all of the sections of the Georgia Code pertaining to the powers and duties of county boards of education. They are by no means limited to "recommending a school tax vote" as suggested at page 26 of the jurisdictional statement. These boards "are invested with the title, care and custody of all schoolhouses or other property, with power to control the same in such manner as they think will best serve the interests of the common schools; and when in the opinion of the board, any schoolhouse site has become unnecessary or inconvenient, they may sell the same in the name of the county board of education; . . . (Ga. Code Ann., § 32-909). In respect to the building of schoolhouses, the said board of education may provide for the same by a tax on all property located in the county and outside the territorial limits of any independent school system" (Ibid.).

We will not labor the question by detailing other duties of such boards.

A person having such fiscal responsibilities should have the qualification of having acquired some property himself. At least, the General Assembly thought so, and certainly its thought cannot be deemed arbitrary and capricious.

> "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it" . . . (citing cases). **McGowan v. Maryland**, 366 U. S. 420, 425-6.

SPECIAL MOTION TO DISMISS OR AFFIRM WITH RESPECT TO W. W. FOUCHE, RASTUS DURHAM AND ELMO BACON, INDIVIDUALLY, AND AS REPRESENTATIVES OF THE CLASS OF PERSONS KNOWN AS GRAND JURORS OF TALIAFERRO COUNTY, GEORGIA.

The notice of appeal filed in the court below October 14, 1968, includes in the caption thereof Fouche, Durham and Bacon, individually and as representatives of the class of persons known as Grand Jurors of Taliaferro County, Georgia.

On motion of the defendants, the defendants Fouche, Durham and Bacon, individually and in their capacities as Grand Jurors of Taliaferro County, Georgia, were by order of the court dated January 30, 1968, stricken as defendants. See the opinion of the court below, 290 F. Supp. 648, 650; Jurisdictional Statement, page 31.

No review of that action of the court is sought in this appeal.

Whatever may be the decision of the court generally as to our motion to dismiss or affirm, Fouche, Durham and Bacon should be stricken as parties.

Respectfully submitted,

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Certificate of Service.

A copy of the within and foregoing Motion to Dismiss or affirm, with supporting argument on behalf of appellees, other than the State of Georgia, has been sent by United States mail with proper postage affixed to the following:

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This January 28th, 1969.

.....
Of Counsel for Appellees other than State of Georgia.